JUDGMENT OF THE COURT (SECOND CHAMBER)
8 JULY 1982 [1]

Robert Bosmans
v Commission of the European Communities

(Official — Assignment to a post in a personal capacity)

Case 189/81

Officials — Applications to the Court — Act adversely affecting an official — Concept — Transfer to a post in a personal capacity of an official already assigned in a personal capacity to another post of the same grade — Transfer permissible

(Staff Regulations of Officials, Art. 91)

A decision of the appointing authority assigning to a post in a personal capacity an official who has already been assigned in a personal capacity to another post of the same grade does not alter the position of the person concerned under the Staff Regulations and therefore does not adversely affect him.

In Case 189/81

ROBERT BOSMANS, an official of the Commission of the European Communities, represented by Edmond Lebrun of the Brussels Bar, 68 Rue Camille Lemonnier, 1060 Brussels, with an address for service in Luxembourg at the Chambers of Tony Biever, Advocate, 83 Boulevard Grande-Duchesse-Charlotte,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Principal Legal Adviser, J.-P. Delahousse, acting as Agent, assisted by Daniel Jacob of the Brussels Bar, 93 Avenue Brillat Savarin, 1050 Brussels, with an address for service in Luxembourg at the office of O. Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

1 — Language of the Case: French.

APPLICATION for the annulment of the Commission decision of 25 June 1980 assigning the applicant as an adviser to Directorate IX-A, Personnel, with effect from 1 August 1980, in so far as it is to an A 3 post in a personal capacity, for a declaration that the post occupied by the applicant is and must be an established A 3 post, and also for the annulment of the rejection of his request of 25 July 1980 and of his complaint of 2 December 1980,

THE COURT (Second Chamber)

composed of: O. Due, President of Chamber, A. Chloros and F. Grévisse, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure, the submissions, arguments and conclusions of the parties may be summarized as follows:

I — Facts and written procedure

The applicant entered the service of the Commission on 1 September 1958, in Grade A 5. He was promoted to Grade A 4 and then to Grade A 3. In the latter grade, which he has held since 1 October 1963, he was appointed Head of the Division on Relations with the Communities and Europan Organizations, which is part of Directorate General I, External Relations. Subsequently, until August 1980, he headed various divisions in Directorates General I and IX.

On 25 June 1980, in the framework of the reorganization of Directorate General IX, Personnel and Administration, decided upon by the Com-

mission, the applicant was assigned as an adviser to Directorate A, Personnel, of that Directorate General, following the merger of the Salaries, Pensions, Missions and Miscellaneous Allowances Division, headed by the applicant, with the Individual Rights and Privileges Division.

The memorandum of 26 June 1980 from Mr Baichère, Director General of Directorate General IX, effecting the reassignment, did not state whether the A 3 post was established or in a personal capacity. The applicant attempted to clarify that question by a request of 25 July 1980 pursuant to Article 90 (1) of the Staff Regulations.

In a memorandum of 13 October 1980, the Director General did not refer to that request but replied: "... you continue to occupy an A 3 post in a personal capacity in the list of posts."

The applicant's complaint of 2 December 1980 pursuant to Article 90 (2) of the Staff Regulations against the decision assigning him to an A 3 post in a personal capacity was rejected by a decision of which the applicant was notified on 29 June 1981.

However, considering that the delay in replying to his complaint constituted an implied decision rejecting it, the applicant had lodged his application on 19 June 1981, ten days before the communication of the express rejection of his complaint

The written procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should:

"1. Declare the application admissible and well-founded;

2. Consequently:

(a) annul the defendant's decision of 25 June 1980 in so far as the applicant's assignment as an adviser to Directorate IX-A, Personnel, with effect from 1 August 1980, is to an A 3 post in a personal capacity;

(b) declare that the post occupied by the applicant under the said decision is and must be an established A 3 post listed in the defendant's list of posts;

(c) annul the rejection of the request of 25 July 1980 and of the complaint of 2 December 1980;

3. Order the defendant to pay the costs."

The *Commission*, on the other hand, contends that the Court should:

1. Declare that the application is inadmissible and in any event unfounded;

2. Order the applicant to pay the costs.

III — Submissions and arguments of the parties

A — Admissibility

The *Commission* raises an objection of the inadmissibility of the action. It contends that the applicant has occupied an A 3 post in a personal capacity at least since 1 August 1973. This application therefore calls in question a situation which has existed for eight years without

interruption and consequently the periods prescribed in the Staff Regulations have not been observed.

The *applicant* contests that argument. He points out that after his assignment in a personal capacity on 1 August 1978 his request of 3 January 1974 was withdrawn as a result of verbal assurances given to him by Mr Baichère to the effect that the decision relating to his assignment was vitiated by certain inaccuracies and that his previous administrative position had in no way changed. The applicant states that he was therefore convinced that he occupied an established post. However, in the event of his submission's not being accepted by the Court, the applicant claims in the alternative that the decision which is now contested in any case contains a new factor altering the legal or factual position resulting from the original decision, if it should be considered that there was such a decision and that it might be pleaded against the applicant. That new factor is the applicant's assignment to the new post of adviser as from 1 August 1980, in so far as it is to a post in a personal capacity.

The *Commission* denies that the remarks attributed to Mr Baichère were made and maintains that since that time the applicant has continued to occupy a post in Grade A 3 in a personal capacity and that he withdrew his request in full knowledge of the facts without being given a "verbal assurance" such as he alleges. Moreover, the fact that the applicant made a new request on 25 July 1980 proves that he could not have made a mistake in that regard.

The applicant's arguments in the alternative must also be rejected, according to the Commission because his new assignment as adviser is a measure of an administrative nature which does not introduce any new factor since it did not in any way alter his assignment in the budget.

B — Substance

The *applicant* claims that there was a breach of and/or failure to observe:

Articles 1, 5, 7 (1) and Annex I, Part A, of the Staff Regulations of Officials;

The Commission decision "describing the basic posts figuring in Annex I-A of the Staff Regulations of the European Communities, and the duties they involve ...";

The Commission decision of 10 December 1963 promoting him, as from 1 October 1963, to Grade A 3;

Principles of law, such as the principles of equality, good administration and distributive justice.

The applicant claims that by the decision in question he was wrongly and unlawfully assigned to an A 3 post in the list of posts, not in a permanent capacity but in a personal capacity.

In particular, the applicant claims that the status of official involves assignment to an established post in the institution's list of posts. Thus the official is entitled to a post corresponding to his grade not only in relation to the nature of the duties and description of that post but also in relation to the classification of the post in the list of posts and also to equal treatment.

Furthermore, the applicant maintains that the distinction between established posts and posts held in a personal capacity is incomprehensible and ambiguous.

In addition, the applicant claims that the creation of established posts and posts held in a personal capacity leads to discrimination, since a post held in a personal capacity does not carry the same chances of promotion, transfer or assignment to a higher post as a post in an established capacity.

Moreover, according to the applicant, so far as non-material interests are concerned, the ambiguity of the expression "in a personal capacity" covers two opposite situations in relation to a post: that of the official who holds a post of a grade lower than the grade to which he is assigned in a personal capacity — for example, an A 3 official "in a personal capacity" assigned to a post of principal administrator (A 4) — and, in addition, that of the official who holds a post corresponding to the grade to which he is assigned in a personal capacity— for example, an A 3 official "in a personal capacity" assigned to a post as Adviser (A 3).

The applicant states in particular that it is the absence of legal basis for the creation of posts in a personal capacity which makes the Comission's practice unjustified. The explanation that that practice was implemented because of budgetary constraints is not accurate and, moreover, the description of a post for budgetary purposes is not irrelevant to the application of the Staff Regulations.

Lastly, the applicant claims that his post appears in the Commission's list of posts among the established posts but in Grade A 4, not Grade A 3. The defendant's practice has thus created confusion, for the applicant — who is in Grade A 3 — occupies an established post in Grade A 4, although in his personal capacity he has a post in Grade A 3.

The *defendant* contends that the applicant's legal position is identical in every respect to that of other Grade A 3 officials in the institution and that his assignment in a personal capacity has not in any way affected his position under the Staff Regulations or his material or non-material interests. The Commission states that Grade A 3 corresponds to the basic post of head of division; the duties which correspond to that post are those of head of division *sensu stricto* and adviser; an adviser is defined as a "highly qualified official with the task of advising one body of the institution or engaged in studies or supervisory work, under the authority of a Director General or a Director". Again, the Commission points out that the applicant enjoys all the rights and obligations attached to Grade A 3, in particular in relation to his salary and his eligibility for promotion to Grade A 2.

On the other hand, it states that the applicant's allegation concerning the legal basis of the distinction between posts which are permanent and those held in a personal capacity is unfounded and arises as a result of the fact that the applicant confuses an official's position under the Staff Regulations with a provision which relates only to the budget. The Commission explains that budgetary constraints prevent the number of officials and other servants from being increased, whilst the institution may on grounds relating to the interest of service find it necessary to increase the number of officials in a given grade beyond the posts fixed in the list of posts pursuant to authorization from the budgetary authority. That is the explanation for the existence of so-called

posts "in a personal capacity". According to the Commission, that concept is exclusively budgetary and has no effect on the definition of the post under the Staff Regulations, as provided in particular by Article 5 of the Staff Regulations and Annex I, Part A, and consequently from the point of view of the Staff Regulations there is only one category of posts.

The Commission states that although it cannot be denied that every official is appointed to an established post in a specific grade, it does not follow from that, from the budgetary point of view, that he must be paid on the basis of the appropriation which corresponds to a post of the same grade. In reality the holder of a post, whether or not in a personal capacity, is assigned to an established post; the fact that in certain cases the established post which appears in the list of posts is in the grade immediately below that of the official who occupies it does not, in the Commission's opinion, in any way detract from its nature as an established post, which will subsist at least as long as the same official occupies that post; therefore the post is established in relation to the official who holds it.

The Commission contends that from the above-mentioned considerations the applicant has in no way shown that the assignment of posts in a personal capacity constituted an act adversely affecting him. Since the applicant has failed to show that his future is jeopardized or the existence of ambiguity at least so far as his own situation is concerned, there is no non-material interest such as is alleged, and it is clear that the application seeks to challenge a measure which is not capable of adversely affecting the applicant.

IV — Oral procedure

At the sitting on 18 February 1982, oral argument was presented by Edmond Lebrun of the Brussels Bar, for the applicant, and by Daniel Jacob of the Brussels Bar, for the Commission. Questions put by the Court were also answered.

The Advocate General delivered his opinion at the sitting on 10 June 1982.

Decision

1 By an application lodged at the Court Registry on 19 June 1981, Mr Bosmans, an official of the Commission of the European Communities brought an application for the annulment of the Commission decision of 25 June 1980 assigning him as an adviser to Directorate IX-A with effect from 1 August 1980, in so far as it was to an A 3 post in a personal capacity, and for the annulment of the rejection of his request of 25 July 1980 and of his complaint of 2 December 1980 which asked that that post should be an established A 3 post.

2 The applicant entered the service of the Commission on 1 September 1958 in Grade A 5. He was promoted to Grade A 4 with effect from 1 March 1960, then to Grade A 3 as head of division with effect from 1 October 1963, and he occupied corresponding posts in the Commission's list of posts. On 1 August 1973 he was assigned to a post in which he retained his Grade A 3 in a personal capacity.

3 Indeed, according to the list of posts within the meaning of Article 6 of the Staff Regulations published in the Official Journal on 19 November 1973 and a detailed list of posts dated 30 October 1973, the post to which the applicant was appointed on 1 August 1973 was an A 5/A 4 post, but was occupied by him as an official in Grade A 3 in a personal capacity. Following that assignment, the applicant lodged a request with the appointing authority asking that his new post should be replaced by another identical as to its established nature to that which he had held without interruption since 1 October 1963. However, that request was withdrawn on 8 February 1974.

4 On 25 June 1980, the applicant was transferred to a post as an adviser in Directorate A, Personnel, of Directorate General IX of the Commission. The applicant disputes the legality of that decision, inasmuch as it assigns him to a post in a personal capacity, as well as the rejection of his request of 25 July 1980 that, in accordance with Articles 25 and 90 of the Staff Regulations, the appointing authority should confirm that he occupied one of the A 3 posts in the list of posts other than the A 3 posts in a personal capacity.

5 He claims that there has been an infringement of Articles 1, 5 and 7 (1) of the Staff Regulations of Officials of the European Communities, of the Commission decision under Article 5 (4) of the Staff Regulations defining the duties and powers attaching to each basic post in Annex I, Part A, of the Staff Regulations, of the Commission decision of 10 December 1963 promoting the applicant to Grade A 3, and also a breach of principles of law, in particular the principles of equality, good administration and distributive justice.

6 According to the applicant, his assignment to an A 3 post in a personal capacity conflicts with the right of an official to be assigned from the

beginning and throughout his career to an established post in the list of posts of his institution corresponding to his grade not only so far as the nature of the duties and the description of the post are concerned, but also in relation to the classification of that post in the list of posts.

7 He considers that his assignment is the result of a practice which has no legal basis and which constitutes a source of confusion and unequal treatment of officials.

8 The Commission contends that the assignment to an A 3 post in a personal capacity has no effect on the applicant's position under the Staff Regulations or on his material and non-material interests, since the post in a personal capacity is exclusively a budgetary concept which does not affect the definition of posts under the Staff Regulations, resulting particularly from Article 5 and Annex I, Part A, thereof.

9 The Commission further claims that the application is inadmissible, inasmuch as it calls in question a situation which has existed for at least eight years without interruption, since the decision of 25 June 1980 has had no effect on the applicant's position under the Staff Regulations or on his material and non-material interests.

10 It is common ground that the application seeks to challenge the decision of 25 June 1980 by which the applicant was assigned as an adviser to an A 3 post in a personal capacity. By assigning the applicant to an A 3 post in a personal capacity, the decision in question did not alter his position under the Staff Regulations, which resulted from his assignment to an A 3 post in a personal capacity with effect from 1 August 1973.

11 If follows that in so far as the contested measure retains the applicant in an A 3 post in a personal capacity, it neither alters nor seeks to alter the applicant's position. Therefore in this respect it is not an act which adversely affects him.

12 The applicant does not contest the legality of his transfer to the post of adviser, which is the true purpose of the contested decision of 25 June 1980.

13 The application must therefore be dismissed as unfounded and it is unnecessary to examine the objection of inadmissibility raised by the Commission.

Costs

14 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs.

However, under Article 70 of the Rules of Procedure, costs incurred by the institutions in applications by officials of the Communities are to be borne by the institutions themselves.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the parties to bear their own costs.**

Due Chloros Grévisse

Delivered in open court in Luxembourg on 8 July 1982.

J. A. Pompe
Deputy Registrar

O. Due
President of the Second Chamber